COMMONWEALTH OF KENTUCKY
SUPREME COURT

FILE NO: 2015-SC-000178

KENTUCKY CATV ASSOCIATION, INC.

APPELLANT

vs.

CITY OF FLORENCE, KENTUCKY;
CITY OF WINCHESTER, KENTUCKY;
CITY OF GREENSBURG, KENTUCKY;
CITY OF MAYFIELD, KENTUCKY; AND
KENTUCKY LEAGUE OF CITIES, INC.;
LORI HUDSON FLANERY (IN HER OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE AND ADMINISTRATION CABINET); AND THOMAS B. MILLER (IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE)

APPELLEES

BRIEF OF APPELLANT, KENTUCKY CATV ASSOCIATION, INC.

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Brief of Appellant, Kentucky CATV Association, Inc. was served by U.S. mail, postage prepaid, this 11 day of April 2016, upon: Bethany Atkins Rice, Office of Legal Services for Revenue, P.O. Box 423, Frankfort, Kentucky 40602-0423; and Barbara B. Edelman, David J. Treacy, and Haley Trogdlen McCauley, Dinsmore & Shohl LLP, 250 W. Main Street, Suite 1400, Lexington, Kentucky 40507.

Timothy J. Eifler

INTRODUCTION

This case presents the question of whether Kentucky's decade-old Multichannel Video Programming and Communications Services Tax ("Telecommunications Tax"), which brought much-needed neutrality to video and telecommunications competitors [MT1]in the Commonwealth, is constitutional.

The trial court answered the question in the affirmative, finding the Telecommunications Tax was a valid exercise of the General Assembly's constitutional authority to use "general laws" to regulate "the payment of license fees on franchises," but the Court of Appeals reversed, disavowing prior decisions of this Court and the Kentucky Constitution, which confirm the General Assembly's broad authority to regulate franchises and franchise-related fees.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(C)(ii), Appellant, KCTA, requests that the Court grant oral argument because this is a case of first impression regarding the constitutionality of the Telecommunications Tax . The implications of this case will impact not only telecommunications service providers, but also their customers, local governments and all of the citizens of this state.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Over the past few decades, the communications industry has undergone a sea change highlighted by new market entrants and increased competition. These changes caused increasing discrimination in the tax treatment of competing telecommunications, multi-channel video, and direct broadcast satellite service providers, some of which were subject to various fees and taxes and some of which were not. In 2005, the General Assembly responded by modernizing and equalizing the state's taxation of communications service providers by enacting the Telecommunications Tax.

The Telecommunications Tax provides a uniform method for taxing communications services and communications service providers. To ensure that all communications services are subject to the same taxes regardless of their mode of delivery, the General Assembly enacted the Telecommunications Tax, thus taking back from municipal governments the authority to impose franchise fees on telecommunications providers, including cable television providers that paid the new tax. As a result, cities, towns, taxing districts and municipalities (together, the "Local Governments") are prohibited from imposing franchise fees on multichannel video service providers, and are instead entitled to a percentage of Telecommunications Tax revenue collected by the Commonwealth.

The Local Governments, including the Cities, have been willing recipients of tax distributions for more than a decade. But the Cities became unhappy with the amount of money they received under the Telecommunications Tax. In 2011, they filed suit claiming that the provisions in the Telecommunications Tax that prohibited the Local Governments from imposing franchise fees violated Sections 163 and 164.

KCTA is a trade association representing providers of cable television, high-speed Internet access, and voice services throughout the Commonwealth of Kentucky.[1] KCTA maintains that the Court of Appeals decision must be reversed since neither Section 163 nor Section 164 addresses franchise fees or taxation or prohibits the General Assembly from devising a more equitable system for taxing communications service providers — even if the Local Governments receive slightly less franchise-related revenue. Indeed, Section 181 expressly authorizes the General Assembly to regulate fees on franchises and the Telecommunications Tax is a valid exercise of the General Assembly's authority.

I. Kentucky's constitutional and statutory framework governing local franchises and local fees on franchises

Sections 163, 164 and 181 were part of the Kentucky Constitution as originally adopted in 1891. Together, these sections govern local franchises and local fees on franchises.

Section 163 allows utilities to occupy public rights of way:

> § 163. Public utilities must obtain franchise to use streets.
>
> No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

[1] KCTA's 18 members serve hundreds of thousands of multichannel video services customers across the Commonwealth, and millions of customers throughout the United States. (Trial Court Record at 58 (hereinafter cited as "TR __"), KCTA's Memorandum of Law in Support of Its Motion to Intervene and be Made a Party Defendant to this Action at 59; TR 206 at 208; TR 310 at 312.)

Section 164 governs the Local Governments' ability to grant franchises and provides as follows:

> § 164. Term of franchises limited – Advertisement and bids.
>
> No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

Section 181 affords the General Assembly with the power to authorize local fees and taxes, including local fees on franchises, and to delegate (or not delegate) to the Local Governments to collect such local fees and taxes:

> The General Assembly shall not imposed taxes for the purposes of any county, city, town or other municipal corporation, but may by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly ***may, by general laws only, provide for the payment of license fees on franchises***, stock used for breeding purposes, the various, trades, occupations and professions, or a special or excise tax; ***and may, by general laws, delegate the power*** to counties, towns, cities and other municipal corporations, to ***impose and collect license fees*** on stock used for breeding purposes, ***on franchises***, trades, occupations and professions. And the General Assembly may, by general laws only, authorize cities or towns of any class to provide for taxation for municipal purposes on personal property, tangible and intangible, based on income, licenses or franchises, in lieu of an ad valorem tax thereon: Provided, Cities of the first class shall not be authorized to omit the imposition of ad valorem tax on such property of any steam railroad, street railway, ferry, bridge, gas, water, heating, telephone, telegraph, electric light or electric power company. (Emphasis added).

Shortly after the adoption of the 1891 Kentucky Constitution, the General Assembly expressly delegated to cities the authority not only to charge, but to determine the amount of license fees on franchises, as permitted under Section 181. That delegation is apparent from the original charters enacted by the General Assembly pursuant to Section 181 and former Section 156[2] for each of the six classes of cities delineating their governance and powers. Those charters recognize each class's power to ***grant*** franchises in one section, without reference to the charging of any fee, and in separate sections authorize the ***charging*** of "license fees on franchises" using the language of Section 181.[3] Both KRS 91.200 and 92.280, the successor statutes to these original charters, continue to authorize cities to impose and collect "license fees on franchises." *See* KRS 91.200(1) and 92.280(2).

As discussed in more detail below, by enacting the Telecommunications Tax, the General Assembly exercised its power under Section 181 and withdrew the authority previously delegated to cities with respect to fees on franchises issued to telecommunications providers, including cable television providers.

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[2] Prior to its repeal in 1994, Section 156 of the Kentucky Constitution stated in part:

> The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. ... The General Assembly, by a general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the General Assembly after the organization of said town or city.

[3] *See, e.g.,* 1893 Ky. Acts ch. 241, § 9(1) and (25) (charter for cities of the fourth class) (TR 477); 1894 Ky. Acts ch. 100, Art. IV, § 1 (charter for cities of the second class) (TR 523); 1893 Ky. Acts ch. 222, § 29 (charter for cities of the third class) (TR 564.).

II. The background, intent and application of the Telecommunications Tax

Prior to the enactment of the Telecommunications Tax, Kentucky taxed providers of communications services differently. For example, satellite companies did not pay state or local taxes or fees on their video programming services while cable television companies paid franchise fees of up to five percent of their gross revenues. Cable companies also paid property tax on their intangible property but satellite companies did not.[4]

AT&T, claiming that it was not required to obtain local franchises for its telecommunications services or pay any local franchise fees, also received preferential tax treatment under the old tax regime. *See, e.g., Southern Bell Tel. & Tel. Co. v. Commonwealth*, 266 S.W.2d 308, 310 (Ky. 1954); *Lexington-Fayette Urban Cnty. Gov't v. Bellsouth Telecomms., Inc.,* 14 F. App'x 636 (6th Cir. 2001) (upholding AT&T-Kentucky's claim that it is not subject to Lexington's then five-percent franchise fee); *see also Mediacom Southeast LLC v. BellSouth Telcomms., Inc.*, 672 F.3d 396 (6th Cir. 2012) (AT&T-Kentucky claimed it was not required to obtain local franchises and pay local franchise fees to provide multichannel video service). These disparities created significant differences in the taxes paid by consumers of video services, denying Kentucky residents a tax-neutral choice of service providers.

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[4] In *Insight Kentucky Partners II, L.P. v. Commonwealth*, No. 01-CI-01528 (Franklin Cir. Ct. Jan. 30, 2004), the court found that since there was no substantial distinction between cable and direct broadcast satellite ("DBS") companies from a revenue raising perspective, requiring cable companies to pay additional property taxes violated the uniformity requirement of Section 171 of the Kentucky Constitution. *See infra.*at II.

The Telecommunications Tax was designed to level the tax and fee playing field for competing communications providers in Kentucky. Specifically, the Telecommunications Tax regime:

> (1) Addresses an important state interest in providing a fair, efficient, and uniform method for taxing communications services sold in this Commonwealth;
>
> (2) Overcomes limitations placed upon the taxation of communications service by federal legislation that has resulted in inequities and unfairness among providers and consumers of similar services in the Commonwealth;
>
> (3) Simplifies an existing system that includes a myriad of levies, fees, and rates imposed at all levels of government, making it easier for communications providers to understand and comply with the provisions of the law;
>
> (4) Provides enough flexibility to address future changes brought about by industry deregulation, convergence of service offerings, and continued technological advances in communications; and
>
> (5) Enhances administrative efficiency for communications service providers, the state, and local governments by drastically reducing the number of returns that must be filed and processed on an annual basis.

KRS 136.600.

To ensure uniformity in tax treatment, the new Telecommunications Tax:

(1) was imposed on a statewide basis on all competing communications providers, KRS 136.604(2) (excise tax), 136.616(2) (tax on gross revenues);

(2) eliminated property taxes on intangible assets; and

(3) eliminated duplicate sales and use taxes on communications services by providing communications service providers with a sale-for-resale exemption from sales tax, KRS 139.195(5)(b) and (7).

The General Assembly at the same time withdrew its delegation of authority to the Local Governments to impose franchise fees on telecommunications providers, including cable television providers that paid the new tax, a necessary element for effectuating a state-wide uniform system of taxation. KRS 136.660(1) and (2) (prohibiting the imposition of "any tax, charge or fee" whether designated as a franchise fee or otherwise). Replacing a patchwork of local franchise fees, revenue from the new statewide Telecommunications Tax is deposited into a state fund administered by the Department of Revenue, which is then distributed on a monthly basis to Local Governments. KRS 136.650, 136.652, 136.654, 136.656, 136.658; *see also* TR 1, Complaint at 7-8, TR 310 at 314.) The Local Governments, including the Cities, have received these distributions for more than a decade, since collections began in January 2006. (TR 310 at 314.)

III. The Cities' lawsuit in Franklin Circuit Court and KCTA's intervention

The Cities brought this action in Franklin County Circuit Court against the State's Secretary of the Finance and Administration Cabinet (the "Cabinet") and the Commissioner of the Department of Revenue (together with the Cabinet, collectively referred to as the "Department"). The Cities contended that the Telecommunications Tax was unconstitutional under Sections 163 and 164 because it prohibited them from collecting franchise fees from cable service providers. (TR 206, Plaintiff's Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings, at 217-21.) Yet the Cities' real motivation behind this lawsuit was made clear during discovery. The Cities did not necessarily believe that Telecommunications Tax was unconstitutional, but rather sought to "ruffle feathers in [the] legislature." (TR 310 at 314, 345, 356.) Presumably,

by "ruffl[ing] feathers," the Cities could coerce the Legislature to increase the cap on the tax distributions from the gross revenues and excise tax fund established in 2005. (TR 310 at 314, 351) (noting in January 2010 newsletter that "[d]uring the last three sessions [Appellees] KLC has worked with Rep. Ron Crimm (R-Louisville) on legislation that would make cities whole by correcting the shortfall going forward.")[5]

The Cities' true motivation behind the lawsuit was further evidenced by their inconsistent position on the relief sought. In their Complaint, the Cities first sought to have the entire Telecommunications Tax declared unconstitutional. (TR 1 at 14.) Subsequently, in their briefing, the Cities advocated a "surgical" approach to the invalidation of the Telecommunications Tax only insofar as it prohibits them from collecting franchise fees. (TR 630, Plaintiff's Reply to KCTA's and Finance and Administration Cabinet's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings and Response to Cross Motions for Judgment on the Pleadings at 647.)

The lawsuit threatened the interests of KCTA and its member companies (collectively, the "Cable Companies") by seeking a return to the prior discriminatory system of taxes and fees that put the Cable Companies at a competitive disadvantage relative to companies like DIRECTV, Inc., DISH Network, LLC and AT&T-Kentucky. KCTA's motion to intervene in this lawsuit was granted by the circuit court. (TR 134, Order Granting KCTA's Motion to Intervene at 134.)

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[5] During the pendency of the circuit court proceedings, the Kentucky Board of Tax Appeals (the "Board") denied Appellee, City of Florence, and other political subdivisions' request to increase the monthly "hold harmless" payment due under the Telecommunications Tax. *City of Ten Broeck et al. v. Dep't of Revenue*, File No. K07-R-23, Order No. K-23028 (Ky. Bd. Tax App. Mar. 12, 2013). The Board stated it lacked authority to raise the distribution beyond the statutory cap on the monthly payment. Importantly, the Board noted that, although the "hold harmless" amount was intended to compensate the taxing jurisdictions, the statute does *not* provide that jurisdictions "shall be held harmless." *Id.* The Board also advised that the localities' remedy lies with the Kentucky Legislature. *Id.*

IV. The parties' positions and the Franklin Circuit Court's Opinion and Order upholding the constitutionality of the Telecommunications Tax

All parties, the Cities, the Department, and KCTA, filed motions for judgment on the pleadings.

The Department and KCTA agreed that no right to charge franchise fees—implied or otherwise—was granted by Sections 163 and 164. Section 163 is directed only to public utilities—not the Local Governments—and simply requires that public utilities obtain franchises to use streets from the Local Governments. Section 164, which is directed to the Local Governments, only guarantees the Local Governments a limited right to control the original occupation of their streets and public ways. (TR 310 at 316-319.) The Department and KCTA explained that the Telecommunications Tax did not interfere with the *grant* of a franchise and the original occupation of public rights of way. (TR 283, The Finance and Administration Cabinet's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings and in Support of Its Cross-Motion for Judgment on the Pleadings, at 295-299; TR 310 at 317-319, 321.)

KCTA further asserted that the Telecommunications Tax was enacted in accordance with the Commonwealth's retained powers under Section 181. (TR 310 at 323-324.) KCTA explained that Section 181 vested the General Assembly with exclusive authority to determine whether and the manner in which a Local Government may charge monetary fees on franchises and authorized, but did not require, the General Assembly to delegate that authority to Local Governments. (TR 310 at 324-326.) KCTA also explained that the Telecommunications Tax was entitled to a strong presumption of validity and constitutionality and that the Cities' requested relief would violate the

Uniformity Clause and Equal Protection Clause of the Kentucky and U.S. Constitutions. (TR 310 at 326-327, 328-329.)

The Cities claimed that the Telecommunications Tax violated Section 163 and 164, because those sections conferred on the Local Governments a purported *implied right* to charge fees on franchises. (TR 1 at 9-21.) Although the Cities acknowledged that neither section actually mentioned an implied right to charge franchise fees or contained any language prohibiting the Commonwealth's Legislature from limiting Local Governments' authority to collect franchise fees, the Cities claimed there was "a clear implication" to limit the Legislature's authority. (TR 206 at 219.)

The circuit court granted the Department and KCTA's motions for judgment on the pleadings.[6] The court concluded that Sections 163 and 164 grant the Cities the limited right to control the original occupation of their public rights-of-way but do not prohibit the General Assembly from enacting the Telecommunications Tax. (TR 796, Opinion and Order at 802.) The court explained that the Telecommunications Tax was a valid exercise of retained legislative authority pursuant to Section 181. (*Id.* at 804-805) Accordingly, the circuit court found the Telecommunications Tax to be constitutional. (*Id.* at 806.) The court expressly noted that the Cities' fundamental concern with the amount of money they received under the Telecommunications Tax is an issue that must be resolved through the legislative process. (*Id.* at 806-807.)

V. The Court of Appeals' unpublished Opinion reversing the Franklin Circuit Court Opinion and Order

In an unpublished opinion, the Court of Appeals reversed the Circuit Court, finding that the Telecommunications Tax "seeks to impose state tax at the expense of

[6] The Court of Appeals observed that since matters outside the pleadings were considered by the circuit court, the motions should have been treated as motions for summary judgment.

franchise fees." The Court of Appeals summarily concluded that the Telecommunications Tax violated Sections 163 and 164 by prohibiting the Cities from collecting franchise fees. According to the appellate court, "Section 163 of the Kentucky Constitution delegated to local governments the right to grant utility franchises and necessarily the concomitant right to collect franchise fees." (Op. at 7.)

The Court of Appeals did not address or even acknowledge Section 181's *express* grant of exclusive authority to the General Assembly to control local taxes and fees on franchises. The court also failed to address the impact of the Telecommunications Tax's savings clause, KRS 446.090,[7] or whether its holding would result in a violation of the uniformity requirement of Section 171 of the Kentucky Constitution, by stepping back in time to a system which sorely lacked it.

ARGUMENT

I. The Court of Appeals implied a right that does not exist in, and cannot be implied from, the language of Section 163 or Section 164.[8]

Kentucky law requires that before rights or obligations may be found to have been bestowed by a constitutional provision, the provision must grant ***explicit*** authority. This Court has held that as a "general rule . . . a city possesses only those powers *expressly* granted by the Constitution and statutes plus such powers as are necessarily implied or incident to the expressly granted powers and which are ***indispensable*** to enable it to carry out its declared objects, purposes and expressed powers." *City of Bowling Green v. T & E Elec. Contractors*, 602 S.W.2d 434, 435 (Ky. 1980) (emphasis added); *see also*

[7] In the Prayer for Relief in the Cities' Complaint, they sought a "declaration that, commencing from the date of final judgment, the Telecom Tax is unconstitutional insofar as it prohibits Plaintiff Cities from collecting franchise fees, . . ." The Cities' Reply Brief to the Court of Appeals requested the same prospective relief. The Court of Appeals *sua sponte* declared the Telecommunications Tax to be unconstitutional *in toto*.

[8] This issue was argued and preserved before the trial court (TR 310 at 317-324) and in KCTA's brief to the Court of Appeals filed on December 16, 2013.

Lexington-Fayette Urban Cnty. Bd. of Health v. Bd. of Trs. of the Univ. of Ky., 879 S.W.2d 485 (Ky. 1994). Any doubt about the existence of a particular municipal power is always resolved against its existence. *City of Horse Cave v. Pierce*, 437 S.W.2d 185, 186 (Ky. App. 1969); *see also Griffin v. City of Paducah*, 382 S.W.2d 402, 404 (Ky. App. 1964).

Neither Section 163 nor 164 provides the Cities with a guaranteed right to collect franchise fees. Indeed, nothing in either provision mentions franchise fees at all. Sections 163 and 164 concern the granting of an original franchise and the manner in which that grant must be accomplished. As discussed in more detail below, it is Section 181 alone that governs fees on franchises, and reserves to the General Assembly the exclusive authority to delegate or withdraw local authority to impose and collect such fees. Consequently, the Telecommunications Tax does not run afoul of Section 163 or 164 in any way and was properly within the Constitutional powers of the General Assembly.

Additionally, even if the Court of Appeals was unsure about how to square Sections 163, 164, and 181, it was required to indulge "every reasonable presumption of constitutionality" in favor of the Telecommunications Tax. *Lovelace v. Commonwealth*, 147 S.W.2d 1029, 1032 (Ky. 1941). A law enjoys this presumption of constitutionality unless "its violation of the constitution is clear, complete and unequivocal." *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572 (Ky. 2001). In making every presumption *against* the constitutionality of the Telecommunications Tax—including by improvising rights that are not granted by Sections 163 and 164, by ignoring the express language of Section 181 entirely, and by deviating from precedent recognizing the General

Assembly's inherent power over franchising—the Court of Appeals failed to accord the Telecommunications Tax its presumption of constitutionality. *See City of Horse Cave*, 437 S.W.2d at 186; *see also City of Paducah*, 382 S.W.2d at 404.

1. Section 163 of the Kentucky Constitution only requires that public utilities obtain franchises if they are using the public rights of way.

Section 163, which bears the title "*Public utilities must obtain franchise to use streets*," only requires public utilities to obtain franchises to use the rights of way. The focus of this section, adopted in 1891, is on public utilities—not the Local Governments—and it requires—just as the title of the section suggests—that "public utilities must obtain [a] franchise to use streets." Public utilities accomplish this by obtaining the consent of the Local Governments. *See Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (recognizing that the title of an act may aid in statutory construction); *Peoples Gas Co. v. City of Barbourville*, 165 S.W.2d 567 (Ky. 1942) (recognizing that while the heading is not a part of the statute, "it embodies a sort of epitome of the meaning of the section"). Section 163 does not mention "franchise fees" and certainly does not provide the Local Governments with, let alone imply, the right to charge franchise fees.

As this Court has observed, Section 163 is intended to "prevent the legislature from authorizing the indiscriminate use of the streets of the city by utilities without the city being able to control the decision as to what streets and public ways were to be occupied by the utility." *City of Florence v. Owen Elec. Coop., Inc.*, 832 S.W.2d 876, 879, 881 (Ky. 1992). Indeed, this Court has recognized that Section 163 does not even grant exclusive franchising authority to the Local Governments. *Id.* at 879. Rather, Section 163 tailors a limited right to control the ***original occupation*** of public ways. *See,*

e.g., id. ("it is clear that the framers of the Constitution meant to vest a municipality with only the right and power to control the original occupation of its public ways and streets"); *Kentucky Utils. Co. v. Bd. of Comm'rs of Paris*, 71 S.W.2d 1024, 1027 (Ky. App. 1933) (hereafter "*City of Paris*").

Nothing in the Telecommunications Tax deprives Local Governments of their limited right to control the original occupation of public ways. As the circuit court correctly observed, the right of political subdivisions to require telecommunications companies to obtain a franchise is specifically and expressly preserved by the Telecommunications Tax in KRS 136.660(7).[9]

2. Section 164 of the Kentucky Constitution only requires that political subdivisions advertise, obtain bids, and enter into franchise agreements for limited terms.

Just as with Section 163, Section 164 contains no mention of "franchise fees." Instead, the focus of this section, which is entitled "*Term of franchises limited; advertisements and bids*," is the term of the franchise that can be granted, and the requirements that the franchise must first be advertised and bids received before the Local Governments can accept or reject a bid.[10]

The Court of Appeals breezily acknowledged that Section 164 has been interpreted as a limit upon authority granted under Section 163, then ignored the

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[9] "Nothing in this section shall prohibit a political subdivision from requiring communications service providers or cable service providers to obtain a franchise as required by Section 163 of the Constitution of Kentucky and from regulating to the fullest extent authorized by state and federal law the use of local rights-of-way by communications service providers or cable service providers." KRS 136.660(7)

[10] Section 164 and its bidding process applies only to Local Governments "authorized or permitted" to grant franchises. *See, e.g.*, KRS 416.140 (reserving to the state the authority to grant certain utilities the right to occupy county rights of way without compensation). Section 164 "does not refer to the Legislature nor to matters which the Legislature may withhold from municipal or local control." *Warfield Nat. Gas. Co. v. Lawrence Cty.*, 189 S.W.2d 357, 359 (Ky. 1945) (quoting *Tri-State Ferry Co. v. Birney*, 31 S.W.2d 932, 933 (Ky. 1920)).

limitation, instead conjuring a right to receive "valuable consideration" not supported by the text itself. (Op. at 6-7.) The Court of Appeals flatly declared the Legislature could not abrogate a city's "constitutionally delegated prerogative" to collect fees, seemingly relying on Section 164 as the delegation. That is not the law. Far from enlarging local powers, Section 164 has long been held only to place limitations on municipal authority. *See Southern Bell Tel. & Tel. Co. v. City of Louisville*, 96 S.W.2d 695, 697 (Ky. 1936); *see also Peoples Gas Co. v. City of Barbourville*, 165 S.W.2d 567 (Ky. 1942). The purpose of the restrictions set out in Section 164 "is to prevent city councils from selling, at an inadequate price, the rights and privileges of the citizens of Kentucky." *Berea College Utils. v. City of Berea*, 691 S.W.2d 235, 236 (Ky. App. 1985). *See also E.M. Bailey Distrib. Co. v. Conagra*, 676 S.W.2d 770 (Ky. 1984); *Hatcher v. Kentucky & West Virginia Power Co.*, 133 S.W.2d 910 (Ky. App. 1939).

Further, as this Court has recognized, whatever authority has been granted to the Local Governments under Section 164 is not absolute: "[i]t is a misconception to characterize Sections 163 and 164 as eliminating total legislative authority regarding franchising. In effect, ***municipalities have only the right to grant street franchises***." *City of Florence,* 832 S.W.2d at 879 (emphasis added). Thus, the limited right to control the original occupation of the public ways given to Local Governments by the sovereign does not strip the sovereign of all rights related to franchising. *See e.g. City of Paris*, 71 S.W.2d at 1029 (recognizing that "the franchise inheres in the sovereignty of the state, and that save to the extent it has been delegated by the Constitution or statutes to some local subdivision, it is subject to the control of the Legislature.")

There is simply no guarantee in Sections 163 or 164 for Local Governments to collect franchise fees, and the Legislature can impact the mode and level of collection of franchise fees without running afoul of any Constitutional guarantees. Further, the absence of a monetary fee received directly from the franchisee is not indispensable to carrying out the objects and purposes of Sections 163 and 164, because regardless of whether a monetary fee is received directly from a franchisee or an "in lieu of" payment is received from the Telecommunications Tax fund, the Telecommunications Tax does not prevent a city from exercising its right to "control the decision as to what streets and what public ways were to be occupied," and to obtain value for the franchise from the highest and best bidder. *City of Paris*, 71 S.W.2d at 1027-28; *see* KRS § 136.660(7).

3. Sections 163 and 164 of the Kentucky Constitution do not prohibit the General Assembly from limiting the Local Governments' authority to collect fees on franchises.

The circuit court correctly concluded that Sections 163 and 164 do not prohibit the General Assembly from exercising control over the levy and collection of franchise fees. (TR 796, Opinion and Order, at 802-03.) Indeed, this Court has repeatedly declared that a franchise is not "purely local" in character. *City of Paris*, 71 S.W.2d at 1029; *City of Florence*, 832 S.W.2d at 879. Instead, the "General Assembly retains significant power over franchising." *City of Florence*, 832 S.W.2d at 879. A franchise "inheres in the sovereignty of the state, and save to the extent it has been delegated by the *constitution* to some local subdivision, it is subject to the control of the legislature." *Id.* at 881 (emphasis added).

The Court of Appeals disregarded the fact that "[n]o language is discerned in either Section 163 or 164 . . . indicating that the state has been deprived of the right to

exercise police power and the right to implement control of rates and services ...." *Id.* Therefore, a franchise granted by a municipality "is granted subject to the right of the state to exercise its police power" provided the Legislature does not act to interfere with the ***grant*** of a franchise to the highest and best bidder or authorize the indiscriminate use of the streets. *See id.* (delineating the police power retained by the state).

The Telecommunications Tax does not interfere with the ***grant*** of a franchise to the highest and best bidder, only the continued imposition of a fee on the franchisee. By enacting the Telecommunications Tax to replace the local collection of franchise fees, the Legislature merely exercised its reserved retained power to establish the means by which cities are compensated for a franchise that had already been granted. The fact that the State did not previously exercise its reserved retained power after the grant of the franchise does not prohibit it from doing so later. *See, e.g., City of Florence,* 832 S.W.2d at 881 ("No language is discerned in either Section 163 or 164 of the Constitution indicating that the state has been deprived of the right to exercise police power. . . ."); *Southern Bell Tel. & Tel. Co. v. City of Louisville*, 96 S.W.2d 695, 698 (Ky. App. 1936) ("The power to regulate rates had been delegated to the city by the Legislature, and what it had given it could take away.")

The enactment of the Telecommunications Tax is consistent with other legislative acts that have had the effect of limiting franchising powers previously delegated to cities. *See, e.g.,* KRS 278.016-.018 (establishing exclusive territories for electric utilities and effectively preventing cities from awarding additional franchises to an electric utility other than the incumbent); KRS 96.010(1) (establishing the procedure for awarding a subsequent franchise); *Southern Bell Tel. & Tel. Co.*, 96 S.W.2d at 698 ("The power to

regulate rates had been delegated to the city by the Legislature, and what it had given it could take away. The act of 1934 which created the Public Service Commission divested the city of the power to regulate rates and reposed that power in the commission."). Therefore, the Telecommunications Tax did not and does not impinge on the municipalities' rights under Section 163 or 164, and as the circuit court correctly held, it is a valid legislative act.

4. The right to charge franchise fees is not implied from the language of Sections 163 and 164 of the Kentucky Constitution.

Despite acknowledging that the "Commonwealth has retained considerable power to regulate local utility franchises," the Court of Appeals nonetheless held that "Section 163 of the Kentucky Constitution delegated to local government the concomitant right to collect franchise fees." (Op. at 7-8.) As discussed above, however, Sections 163 and 164 nowhere give the Local Governments the right to collect franchise fees (or collect them at a particular rate, or from the franchisees directly).

Further, finding an *implied* constitutional guarantee of a right to collect franchise fees directly conflicts with this Court's declaration that as a "general rule . . . a city possesses only those powers *expressly* granted by the Constitution and statutes plus such powers as are necessarily implied or incident to the expressly granted powers and which are *indispensable* to enable it to carry out its declared objects, purposes and expressed powers." *City of Bowling Green v. T & E Elec. Contractors*, 602 S.W.2d 434, 435 (Ky. 1980) (emphasis added); *see also Lexington-Fayette Urban Cnty. Bd. of Health v. Bd. of Trs. of the Univ. of Ky.*, 879 S.W.2d 485 (Ky. 1994). Any doubt about the existence of a particular municipal power must be resolved against its existence. *City of Horse Cave v.*

Pierce, 437 S.W.2d 185, 186 (Ky. Ct. App. 1969); *see also Griffin v. City of Paducah*, 382 S.W.2d 402, 404 (Ky. App. 1964).

In the absence of an express legislative grant of authority, the Local Governments would have the exclusive authority to impose franchise fees under Sections 163 and 164 only if that authority (i) was necessarily implied or incident to the powers expressly granted in those sections ***and*** (ii) was indispensable to enable a city to carry out the objects and purposes of those sections and the powers expressly delegated therein. *City of Bowling Green*, 602 S.W.2d at 435; *City of Paducah*, 382 S.W.2d at 404.

Neither of those conditions is met here. The authority to impose franchise fees has no bearing on a Local Government's authority under Section 163 to allow the initial occupancy of its right of way. It certainly cannot be said to be "necessarily implied or incident" to that power, given this Court's long-standing precedent holding that the General Assembly retains inherent authority to regulate franchises. *See, e.g.*, *Southern Bell Tel. & Tel. Co.*, 96 S.W.2d at 698. Nor is the authority to impose franchise fees necessarily implied from the language in Section 164 requiring that Local Governments award franchises to the "highest and best bidder." As noted above, that proviso was intended to prevent Local Governments from giving away franchises without value—not to afford them an exclusive right to control franchise fees. *See City of Paris*, 71 S.W.2d at 1027-28. Local Governments, moreover, do not require authority over franchise fees to obtain value for the initial franchises they grant. They can and do obtain that value by including terms and conditions in franchises designed to ensure reliable and quality service, adequate customer service, the availability of public, educational and government access channels, indemnification, and more. *See* KRS 136.660(3) (providing

that the prohibition on franchise fees does not extend to these valuable terms and conditions).

Since neither the plain language nor the stated intent of the framers of the Kentucky Constitution provides for the right for cities to charge franchise fees and such right is not indispensable to carrying out the objects and purposes of Sections 163 and 164, such right cannot be implied. *See City of Horse Cave*, 437 S.W.2d at 186; *City of Paducah*, 382 S.W.2d at 404 (resolving questions of implicit constitutional rights against their existence). By implying that right, moreover, the Court of Appeals violated Kentucky's "strict adheren[ce] to" the Separation of Powers Clause of the Kentucky Constitution by usurping the General Assembly's legislative prerogative. *See Diemer v. Commonwealth*, 786 S.W.2d 861, 864 (Ky. 1990); Ky. Const. §§ 27 & 28. The General Assembly has the "right to exercise police power and the right to implement control of rates and services . . . ," and "[n]o language" in Sections 163 or 164 allowed the Court of Appeals to imply the existence of that right for Local Governments. *See City of Florence*, 832 S.W.2d at 881. And by disregarding the separation of powers mandate of Kentucky's Constitution, the Court of Appeals' opinion undermines public confidence in the General Assembly's authority and power to enact taxes that eliminate inequities and unfairness among providers and consumers of similar goods and services in the State.

5. The Court of Appeals ignored the General Assembly's constitutional right to exercise control over the imposition of local taxes and fees on franchises.

At the same time it created an ***implied*** constitutional right that does not otherwise exist in the language of Sections 163 and 164, the Court of Appeals failed to address or

even acknowledge the ***express*** grant of authority given to the General Assembly under Section 181 to control taxes and fees on franchises.

Section 181 authorizes the General Assembly to use "general laws" to impose taxes and "license fees" on "franchises." Section 181 does not itself grant any powers to the Cities, but authorizes the Commonwealth, at its discretion, to delegate to cities and other local governments the authority to impose and collect state-determined local taxes and state-determined "license fees" on "franchises." *See George Weidemann Brewing Co. v. City of Newport*, 321 S.W.2d 404 (Ky. 1959).

Prior the enactment of the Telecommunications Tax in 2005, the General Assembly had expressly delegated to the Local Governments the authority not only to charge, but to determine the amount of "license fees on franchises", and directly collect such fees as permitted under Section 181. That delegation is apparent from the original city charters enacted by the General Assembly for each of the six classes of cities. Those charters separately recognized the power to grant franchises and the authorization to charge "license fees on franchises" using the language of Section 181. (TR 310 at 325.) The statutory successors to these original charter provisions -- KRS 91.200 and 92.280 -- continue to authorize cities to impose and collect "license fees on franchises." *See* KRS 91.200(1) and 92.280(2).

By enacting the Telecommunications Tax, the General Assembly, in KRS 136.660(1) and in accordance with Section 181, simply withdrew the authority previously delegated to cities with respect to fees on franchises issued to cable and telephone companies. *Jacober v. Bd. of Comm'rs*, 607 S.W.2d 126, 127 (Ky. App. 1980) ("what the legislature gives the legislature may take away"); *Hill v. Taylor*, 95 S.W.2d 566, 569

(Ky. 1936) (same). Therefore, the circuit court correctly determined that the Telecommunications Tax is a valid exercise of the General Assembly's power under Section 181. (TR 796, Opinion and Order at 805.)

As the circuit court correctly concluded, the second sentence of Section 181 clearly provides that the General Assembly "*may*," but is not required to, delegate the power relative to the payment of "license fees on franchises." By enacting the Telecommunications Tax, the General Assembly chose, as it was constitutionally authorized, to withdraw that previously delegated power as to cable and telephone company franchises. Nothing in the first sentence of Section 181 contradicts the plain language of the second sentence.

By failing to consider the *express* grant of authority to the General Assembly provided in Section 181, and instead choosing to read a new and *implied* right into the Kentucky Constitution, the Court of Appeals failed to apply its duty to faithfully interpret the Kentucky Constitution, which "is, in matters of state law, the supreme law of this Commonwealth to which all acts of the legislature, the judiciary and the government agent are subordinate." *See, e.g., Kuprion v. Fitzgerald*, 888 S.W.2d 679, 681 (Ky. 1994). Consequently, this Court should reverse the Court of Appeals' decision and render the Telecommunications Tax constitutional.

II. By voiding all or part of the Telecommunications Tax, the Court of Appeals' decision results in a violation of the Uniformity Clause and Equal Protection Clause of the Kentucky and U.S. Constitutions.[11]

By voiding the Telecommunications Tax,[12] the Court of Appeals' decision results in a step back into the past and the reinvigoration of the arbitrary and unreasonable

[11] This issue was argued and preserved before the trial court (TR 310 at 328-329) and in KCTA's brief to the Court of Appeals filed on December 16, 2013).

classification that was found unconstitutional in *Insight Kentucky Partners II, L.P. v. Commonwealth*, No. 01-CI-01528 (Franklin Cir. Ct. Jan. 30, 2004), and motivated the enactment of the Telecommunications Tax. Generally, a tax classification that is arbitrary and that has no rational relationship to the state's legislative objective results in a denial of equal protection of the law and would be invalid. *Id.*

In *Insight Kentucky Partners,* a provider of cable television services challenged the requirement that cable companies pay additional property taxes under Section 136.120, arguing that taxing cable companies different from competing satellite video companies contravened section 171 of the Kentucky Constitution and the Equal Protection Clause of the U.S. Constitution. Section 171 requires that "[t]axes. . . shall be uniform upon all property of the same class." Insight argued that satellite companies, such as DirecTV, are "like" companies because they offer the same product, television channels, and compete for the same consumers. The Department at the time argued that the differences in delivery systems between cable and satellite companies, cable's use of the public rights-of-way, and that cable wires physically cross over jurisdictional boundaries were sufficient distinctions to warrant a different taxing scheme.

The circuit court rejected these distinctions, recognizing that "constitutional provisions permitting classification always carry with them the limitation that the classification scheme must be reasonable, not arbitrary, and this in turn requires classification on the basis of an appreciable relevancy to the subject matter of the legislation." *Insight Partners* (citing *Gillis v. Yount*, 748 S.W.2d 357, 363 (Ky. 1988)

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[12] It is unclear whether the Court of Appeals decision voided the Telecommunications Tax in its entirety or merely eliminated as Appellees requested of KRS 136.650(1)(b)(2), which requires that Local Governments relinquish their rights to franchise fees by participating in the Telecommunications Tax, and KRS 136.660(1), which prohibits Local Governments from collecting franchise fees.

(internal quotes omitted)). Instead, the court stated it "cannot fathom why the continuity of cable wire is a substantial distinction for taxation purposes." The court then held that "[s]ince no substantial distinction exists between cable and DBS companies for the purpose of raising revenue. . . applying KRS 136.120 to cable companies and not DBS companies is arbitrary and violates section 171's uniformity requirement." Because the court decided the case on the state uniformity grounds, the court did not address the equal protection issues. The Department did not appeal the decision.

That reasoning is informative here. Implicit in the reform effort resulting in the Telecommunications Tax was recognition that these competing providers were similarly "like" taxpayers and, thus should be subject to the same taxes. *See generally* KRS 136.600-136.660 (subjecting all multichannel video providers to the same tax). The Cities' desire for more revenue cannot justify the discrimination ended by the enactment Telecommunications Tax. The Court of Appeals decision recreates a flawed tax classification that fails to encompass the entire class of multichannel video service providers in Kentucky in violation of the Uniformity and Equal Protection guarantees of the U.S. and Kentucky Constitutions.

CONCLUSION

For all of these reasons, the Court of Appeals erred in finding the Telecommunications Tax unconstitutional by failing to consider the Kentucky Constitution's express grant of authority to the General Assembly in Section 181 to regulate franchise fees, and by improperly inferring a constitutional right in Sections 163 and 164 that the Constitution does not afford municipalities. Accordingly, KCTA

respectfully requests that this Court reverse the decision of the Court of Appeals and reinstate the decision of the Circuit Court.

Respectfully submitted,

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APPENDIX

Exhibit	Document	Record Cite
Exhibit 1	Opinion and Order of the Franklin Circuit Court dated June 5, 2013	TR 796-809
Exhibit 2	Opinion Reversing and Remanding of the Commonwealth of Kentucky Court of Appeals dated November 7, 2014	Judicial Notice
Exhibit 3	Ky. Const. § 163	TR 332
Exhibit 4	Ky. Const. § 164	TR 333
Exhibit 5	Ky. Const. § 181	TR 334-335
Exhibit 6	*Mediacom Southeast LLC v. BellSouth Telcomms., Inc.*, 672 F.3d 396 (6th Cir. 2012)	Judicial Notice
Exhibit 7	*Insight Kentucky Partners II, L.P.v. Commonwealth,* No. 01-CI-01528 (Franklin Cir. Ct. Jan. 30, 2004)	Judicial Notice
Exhibit 8	*City of Ten Broeck v. Dep't of Revenue*, File No. K07-R-23, Ord. No. K-23028 (Ky. Bd. Tax App. Mar. 12, 2013)	Judicial Notice